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SOME QUESTIONS OF INTERNATIONAL LAW IN THE EUROPEAN WAR ¹

VI

CONTRABAND, RIGHT OF SEARCH, AND CONTINUOUS VOYAGE

By an order in council issued on the 4th of August, 1914, the British Government announced a list of articles which it proposed to treat as contraband "during the war with the German Emperor"; by an order of August 12th the first mentioned order was extended to the war with "the Emperor of Austria—King of Hungary," and by an order of September 21st certain additions were made to the list of contraband articles published in the two preceding orders. By an order in council of October 29th the list of contraband articles in the earlier proclamations was withdrawn in consequence of the complaint of the Swedish Government that it included metallic ores, which were on the free list in the Declaration of London, and that the treatment of such articles as contraband would seriously injure Swedish trade. A new list was therefore substituted, from which ores were omitted.

The earlier lists were practically identical with those of the Declaration of London, except that metallic ores, as has been said, were added, and that air craft and their accessories, which are on the list of conditional contraband in the Declaration, were put on the list of absolute contraband by the English order. Furthermore, unwrought copper, which is not listed in the Declaration of London either as conditional or absolute contraband, was by the order in council of September 21st put on the list of conditional contraband and by the order of October 29th it was transferred to the list of absolute contraband. By the latter order, nickel, iron pyrites, ferro chrome, lead, motor vehicles, rubber, mineral oils, and various other articles were placed on the list of absolute contraband. Hides, pig skins, leather suitable for saddlery, harness or

¹ Continued from the January number, pp. 72–112.

military boots, which were not on either list of the Declaration of London, were put on the list of conditional contraband.

By an order in council of December 23d ² the lists contained in the proclamation of October 29th were withdrawn and a new and extended list in lieu thereof was substituted. On the list of absolute contraband were placed, in addition to the articles so listed in the preceding proclamation, various ingredients used in the manufacture of explosives, resinous products, camphor, turpentine, various chemicals, metals, ores, aluminum, antimony, etc. Finally, by a proclamation of March 11th raw wool, worsted yarns, tin, castor oil, paraffin wax, ammonia and other articles, none of which are used exclusively for war purposes, were declared to be absolute contraband. Cotton, which is on the free list in the Declaration of London, was not listed as contraband in any of the British orders, and Sir Edward Grey has several times given assurances to the American Government that shipments of cotton would not be interfered with. In fact, however, a number of cargoes have been seized and taken into British ports on the suspicion of having contraband concealed in or under the cotton bales. Food stuffs and fuel (other than mineral oils) were at first put on the list of conditional contraband, but in February, corn, wheat and flour were in effect put on the list of absolute contraband in consequence of the German Government's taking over the control of the supply of these articles throughout the Empire.

Considering first the legitimacy of the British classification in the light of the Declaration of London, we may call attention to the fact that the Declaration of London as such is not technically binding on the several belligerents in this war, and even if they chose to regard it as such, they cannot insist upon applying it in their controversies with neutrals except in so far as its rules were a part of the accepted practice of nations before the outbreak of the war. This, because it has not been ratified in accordance with Articles 65-71 which specify the conditions and procedure of ratification. Article 65 declares that "the provisions

² The texts of the orders in council of October 29th and December 23d may be found in the *Congressional Record* for January 13, 1915, pp. 1540-1541. Those of September 21st and October 29th (but not that of December 23d) are published in an article by Mr. Norman Bentwich in this JOURNAL for January last, pp. 38-40.

of the present Declaration must be treated as a whole and cannot be separated." Piecemeal ratification is not, therefore, permissible, for the obvious reason that it would be inequitable to allow a government to adopt that part of the Declaration which is most favorable to its interests and at the same time to reserve its acceptance of the parts which consist mainly of concessions.³ Impartial students of international law can but regret that the British Government has been guilty of the very sort of juggling with the Declaration which this article was intended to prohibit. By an order in council of August 22, 1914, reciting that information had been received of the intention of the Governments of France and Russia to act in accordance with the Declaration "so far as practicable" and it being "desired that the naval operations of the allied forces should be conducted on similar principles," it was announced that the Declaration of London should, subject to certain specified "additions and modifications" be adopted and put into force by His Majesty's Government, as if the same had been ratified by His Majesty. The provisions of the Declaration in respect to the transfer of flag, being more favorable to the interests of Great Britain as a belligerent than the rule which she had always maintained and enforced in the past, were not touched, but those relating to contraband, blockade and continuous voyage, being less favorable than those for which she had formerly contended, were subjected to a radical, not to say, unwarranted, alteration and were put into force as thus modified. Under these circumstances, the Government of the United States very properly declined to recognize the Declaration as having any binding force, and announced that in its relations with the belligerents it would be governed by the existing rules of international law and the treaties between it and the belligerent Powers.

Even if the Declaration were legally in force, it imposes no effective restrictions upon belligerents in the determination of their contraband lists, for Article 23 expressly recognizes the right to add articles "exclusively for war" to the list of absolute contraband therein set forth, provided due notice be given, and Article 25 recognizes a similar right in respect to conditional contraband. In short, the lists embodied in the Declaration are not irrevocably fixed, but are open to extension by

³ Compare Bentwich, *The Declaration of London*, p. 124

belligerents. Nevertheless, articles susceptible of innocent as well as military use cannot, under the existing customary law of nations, be treated as absolute contraband and those which are susceptible of innocent use only cannot be treated as conditional contraband.⁴ This well recognized limitation on the rights of belligerents in respect to the determination of what is contraband is not dependent upon the Declaration of London for its validity. It exists independently of any convention and is, therefore, as binding on the belligerents in the present war as any other long-established and generally accepted rule of international law. It seems clear that this rule has been disregarded by the British Government through its treatment of air craft and copper as absolute contraband, for neither is used exclusively for war purposes. Copper, especially, is used extensively in the industrial arts, much more so in fact than for the manufacture of munitions of war. The same thing may be said with even greater certainty of various other articles which were added to the list of absolute contraband by the orders in council of December 23d, and March 11th and particularly resinous products, rubber, oil, glycerine, zinc, lead, wool, tin, castor oil, etc. Some of them, like rosin and rubber, are on the free list in the Declaration of London. Rosin and zinc are classified in the British manual of naval prize law as conditional contraband, although copper "fit for sheathing vessels," pitch, tar, lead and nitrate of soda are listed as absolute contraband.⁵ The truth is, as Bonfils points out, England has pursued no consistent policy in respect to the determination of contraband,⁶ but it is only just to add that she has not been the only offender in this respect.

In its note of December 28th to the British Government in respect

⁴ Mr. Thomas Gibson Bowles, a member of the English Parliament, in his *Capture at Sea* criticizes Articles 23 and 25 of the Declaration which allow additions to be made to both lists, as one of "the most monstrous and abusive features" of the Declaration, but he seems to overlook the fact that according to existing usage belligerents already had such power, so that the recognition of this right by the Declaration did not alter the existing situation.

⁵ Sir William Scott in the case of the *Nostra Signora de Begona* refused to condemn a cargo of rosin (5 C. Rob. 97) but the British prize courts have uniformly condemned pitch and tar. See the case of the *Twée Jeffrowen*, 4 C. Rob. 243.

⁶ *Droit International Public*, ed. by Fauchille, Sec. 1550. See also Travers-Twiss, *International Law*, Vol. II, Sec. 144.

to the detention of neutral ships and their cargoes, the American Government refrained from discussing at that time the propriety of including certain articles in the contraband list, although it asserted that some of them were open to objection. The right of belligerents to determine what they shall regard as contraband and to adopt such classification as they choose cannot be denied, but it is well established that their action must be in conformity with existing treaties and the generally recognized rules of international law. The right cannot therefore be arbitrarily exercised.⁷ When the French Government in 1885 announced its intention of treating rice as contraband when destined to Chinese ports north of Canton, Lord Granville stated that "His Majesty's Government feel themselves bound to reserve their rights of protesting at once against the doctrine that it is for the belligerent to decide what is and what is not contraband of war regardless of the well-established rights of neutrals." During the Russo-Japanese War, Lord Lansdowne in a communication of July 29, 1904, to Secretary of State John Hay, apropos of the action of the Russian Government in putting coal, naphtha, and other fuel on the list of absolute contraband, expressed substantially the same view and so did Mr. Hay in his protest against the condemnation of the cargoes of the *Arabia* and the *Calchas*.⁸

The distinction between absolute and conditional contraband is as old as Grotius, and as a principle of international law it has never been contested by the United States or Great Britain. It is a distinction of fact, and is founded on the differences in the uses (hostile or innocent) to which certain articles are susceptible of being devoted.⁹ The distinction between articles that are "primarily and ordinarily used for military purposes in time of war" and those that "may be and are used for peaceful or warlike purposes according to circumstances" was dwelt upon by Lord Lansdowne in a communication to Sir Charles Hardinge

⁷ Compare Oppenheim, *International Law*, Vol. II, p. 424.

⁸ *Foreign Relations of the United States*, 1904, p. 760.

⁹ This distinction, however, has been attacked by many Continental publicists, and the Institute of International Law, at its session of 1896, adopted a proposal for the abolition of what it called relative or accidental contraband (*Annuaire*, XVI, p. 205). For a summary of the views of Continental publicists on the subject, see Hershey, *International Law in the Russo-Japanese War*, pp. 162-163.

of August 10, 1914.¹⁰ This distinction has always been insisted upon by the British Government when it was a neutral, but now that it is a belligerent it has to a large degree ignored the principle by treating as absolute contraband many articles which are susceptible of innocent as well as hostile use.

Regarding the detention of American cargoes, which was the principal question to which the American Government addressed itself in its note of December 28th, it appears that several score of vessels, American, Dutch, Italian, Norwegian, and Swedish, laden with American cargoes destined for neutral ports in Europe, have been seized and taken into British ports for examination and in a number of instances have been placed in the custody of prize courts in order to have the validity of the captures determined.¹¹

The grounds upon which the seizures were made, were that the cargoes were suspected of containing concealed contraband, usually copper, or that they were consigned "to order" in neutral countries adjacent to enemy territory, or were destined to a fortified place or government contractors in the enemy's territory. Apparently in no case has any cargo been confiscated; in some cases the ships were released and allowed to proceed with their cargoes; in other cases the cargoes were purchased by the British Government at current prices in England; in still other cases the vessels and cargoes are still in the custody of the prize courts awaiting determination of the question of the validity of the seizures. The long detention of certain cargoes, especially those of perishable food products, has been the subject of special complaint by American shippers.

¹⁰ Parliamentary Papers, Russia, No. 1 (1905), p. 13.

¹¹ Senator Walsh in a speech in the Senate on December 31st last (*Congressional Record*, pp. 773-779) stated that the number of cargoes of copper alone that had been detained prior to that date amounted to 31. Sir Edward Grey, in his reply to the American note, stated that of 773 shipments of all kinds from American ports between August 4th and January 3d, only 45 had been seized and sent to British ports for the verification of their cargoes, and that of these, only 8 had been placed in the jurisdiction of prize courts. Since the later date various other cargoes have been sent in for examination. A statement given out in March by the representatives of Chicago meat packers declared that cargoes of food products aggregating a value of \$8,000,000 had been seized in October and November and were still in the custody of prize courts. Among the ships thus detained were the *Alfred Nobel*, the *Bjornstjerne*, the *Fridland* and the *Vitalia*. On March 22d, a British prize court awarded the owners of these cargoes the sum of \$600,000.

The right of search in every case that has so far arisen has been fully admitted by the American Government. The rule laid down by Sir William Scott in 1799 in the case of the *Maria*¹² that "the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation," would not be contested by any government today. "This right is so clear in principle," said Sir William Scott, "that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture."

What the American Government in its note of December 28th especially complained of was not the right of search but rather the manner in which it had been exercised. Instead of conducting the examination at the time and place of seizure on the high seas and allowing the vessel to proceed on its voyage in case the evidence did not show a hostile destination, seizures have in many cases been made upon mere suspicion and the ships with their cargoes taken into distant British ports and there detained for long periods of time for the purpose of "discovering evidence of contraband upon presumptions not recognized by the established rules of international law." The authorities lay down the general rule that searches must be conducted with as much regard for the rights and safety of the vessel as is consistent with a thorough examination of the vessel and cargo, and that any detention beyond what is necessary is unlawful.¹³ The British naval prize regulations provide that "in exercising the right of search the commander should be careful not to occasion the neutral ship any delay or deviation from her course that can be avoided and generally to cause as little annoyance as possible."¹⁴ The better opinion seems to be that mere suspicion is not

¹² 1 C. Rob. 340.

¹³ See the opinions on this point in Moore's Digest, Vol. VII, pp. 475-479.

¹⁴ Atherley-Jones, *Commerce in War*, p. 343. The London *Weekly Times* in its issue of January 22d admitted that "much of the unavoidable delay, loss and annoyance involved in the necessity of diverting ships to British ports might be avoided if the process of searching them were expedited as much as possible, and if the American Government and the American public were at once put in possession of the facts in each case." The *Times* complained of the slowness and secrecy of methods employed by the British Government.

a sufficient ground for taking a ship into a distant port and there detaining it for further examination; there must be reasonable evidence of hostile destination or use and the onus of proof is on the captor, not on the shipper.

The seizure and sending into distant ports of vessels on mere suspicion have often been the subject of complaint on the part of neutral governments in the past. During the Boer war the German Government protested against the taking by British cruisers on mere suspicion of three German vessels bound to Delagoa Bay, into the ports of Aden and Durban, and the German indignation was only increased when the search failed to reveal the existence of contraband. In 1913 the Hague International Court of Arbitration condemned the Italian Government to pay the Government of the French Republic the sum of 164,000 francs for the unwarranted seizure and detention of the *Carthage* and the *Manouba*, two French merchant vessels bound for ports in North Africa during the Turco-Italian War. It was decided in these cases that the evidence of carrying contraband to the enemy was not sufficient to justify the seizure of the vessels and the taking of them into Italian ports, and consequently the Italian Government was condemned to make suitable reparation for the acts.¹⁵ It seems clear from these and other cases that the seizure and detention of neutral vessels on mere suspicion, unaccompanied by reasonable evidence, are not among the lawful rights of belligerents.

The British Government justified the detentions against which the American Government complained on the ground that strong suspicion, if not evidence, indicated the concealment of contraband, particularly of copper, in or under bales of cotton, that an "imperative necessity for the safety of the country" required a more thorough examination than was possible at sea under modern conditions, and hence the ships must be taken into port where the cargoes could be unloaded and the suspected cotton bales weighed. It also called attention in its second reply to the American note to the fact that during the Russo-Japanese War

¹⁵ See texts of the awards in this JOURNAL, Vol. 7, pp. 623-626. See also the case of the *Neptune* (1795) in Moore, International Arbitrations, Vol. 4, pp. 3843 *et seq.* The cases of the *Carthage* and the *Manouba* and the award of the Hague Tribunal are the subject of an extended analysis by M. Robert Rusé in the *Revue de Droit Int. et de Lég. Comp.*, Vol. 16, pp. 101-133.

and during the Balkan Wars "British vessels were made to deviate from their course and follow the cruisers to some spot where the right of visit and search could be more conveniently carried out" and that in both cases it acquiesced. To take a ship into port, it added, was not the assertion of a new belligerent right, but rather the adaptation of an existing right to modern conditions of commerce. Again, it was alleged by the British Government that the evidence in some cases indicated other fraudulent acts such as the painting of copper bars in imitation of pigs of iron, the labelling of rubber as gum, etc. Finally it was claimed that in some cases the manifests were fraudulent or incomplete, and that the new policy adopted by the American Government of withholding from the public all information regarding the contents and destinations of outward cargoes until thirty days after the clearance of the vessels, increased the difficulty of ascertaining the presence of contraband and made necessary a general system of examinations and detentions which would otherwise have been unnecessary.¹⁶ In the case of vessels bound to an enemy port, and where strong suspicion indicates the concealment of contraband under heavy cargoes, the difficulty of verification at sea would seem to justify the taking of the ships into port where a more thorough examination can be made; otherwise the right of search would in many instances be worthless, but in such cases the captor should be held liable in damages if the evidence does not reveal the presence of contraband. On the other hand, if the vessel is bound to a neutral port, diversion for the purpose of further examination is much less justifiable, if it is justifiable at all.

It would seem that the necessity of detention (which sometimes proves

¹⁶ By an order of October 28th, the American Government forbade collectors and other customs officials to make public such information until thirty days after the departure of the vessel. Prior to that date it had been the practice to file manifests before or at the time of sailing, and information regarding the contents and destination of the cargoes was furnished the press when it was requested. After the outbreak of the war, official representatives of the belligerent Powers communicated to their governments such information regarding suspected shipments as they thought would be of interest, in order that suspected cargoes might be searched on the high seas. The order was the subject of debate in Congress, and was criticized as tending to incite suspicion upon innocent cargoes. (*Congressional Record*, January 7, pp. 1176-1180.) It was revoked in February in consequence of the numerous complaints of exporters.

ruinous to shippers) resulting from the abuse of concealment and fraudulent manifests might be removed by some system of official certification whereby neutral vessels could carry, if they chose, satisfactory assurances that their cargoes consisted only of the goods described in their papers.¹⁷ In some cases such certificates were in fact issued by the United States customs officials under authority of the Treasury Department and in other cases by British consuls under whose supervision the vessels were loaded, but the British Government declined to regard such certificates as conclusive on the ground that they afforded no assurance against subsequent augmentation of the cargo at sea. In several cases cargoes so certified have been seized and taken into port for examination.¹⁸

Another subject of complaint by the American government has been the extension by the British Government of the rule of continuous voyage to the carriage of conditional contraband and the introduction of new principles which create presumptions of guilt not recognized either by the Declaration of London or the existing usage of nations. The order in council of October 29th, as has been said, put the Declaration into effect with important modifications and additions in respect to the classification of contraband, its liability to capture, and the presumptions of hostile destination. Article 35 of the Declaration lays

¹⁷ This suggestion has been made by Lawrence in his *International Law*, p. 474. It has been repeatedly urged by the *London Times* since the raising of the present controversy. See the weekly issues of December 25, 1914, and January 22, 1915. Mr. Henry J. Bigham, a New York admiralty lawyer, suggests a system of loading under the joint inspection of American customs officials and British consuls, the correctness of the manifest being certified to by the collector of the port and the British consul. It is desirable in any case, he adds, that the ships' hatches should be sealed by inspectors, the seals not to be removed during the voyage. This done, the ships should be free to prosecute their voyages without detention. See his suggestions in the *London Weekly Times* for January 22, 1915. It may be remarked that several treaties have been concluded between the United States and various countries in the past providing that certificates of this kind should be accepted by belligerents as evidence that the cargo did not contain contraband. See the list in *International Law Situations*, 1911, p. 104.

¹⁸ For example, the *Greenbrier*, an American steamer bound from New Orleans to Bremen with a cargo of cotton, and bearing a certificate of the British consul at New York, was seized in January by a British cruiser and taken into the port of Kirkwall where it was detained for several days for the purpose of conducting the search.

down the rule that conditional contraband is not liable to capture except when found on board a vessel bound for enemy territory and for the armed forces of the enemy, and when it is not to be discharged in an intervening port. The British order in council mentioned above, however, proclaimed that notwithstanding the provisions of Article 35, vessels bound for neutral ports if the goods are consigned "to order," or if the ship's papers do not show a consignee in enemy territory, should be liable to capture, and that in such cases the onus of proving an innocent destination should lie upon the owner of the goods. The effect of this order was to extend the application of the rule of continuous voyage to the carriage of conditional contraband and to reverse the established rule which places upon the captor, not upon the owner, the burden of proving a hostile destination. Moreover, it introduces a new rule in respect to consignments "to order" by providing that all such cargoes of conditional contraband destined to any neutral port are presumed to be intended for the use of the enemy and are therefore liable to capture. A considerable number of neutral vessels laden with cargoes of American foodstuffs consigned "to order" in European neutral ports have been seized and put in the custody of British prize courts, on the charge that the cargoes in whole or in part were really consigned to German contractors in the neutral countries to which the ships were destined.¹⁹ It was alleged by the British Government that some of the concerns receiving the foodstuffs "to order" were not established houses but had sprung up since the outbreak of the war solely for the purpose of purchasing supplies for the use of the German forces in the field. American shippers assert that consignments "to order" are a general practice in time of peace, and that it possesses certain advantages even when the cargo has already been sold, since the consignee may not be in a position to take the goods on arrival.²⁰ Consignments

¹⁹ Notably the *Alfred Nobel*, the *Bjornsterne* and the *Frülland* laden mainly with Chicago meat products consigned "to order" in Copenhagen. The ships sailed prior to the order in council of October 29th, which laid down the new rule in regard to consignments "to order." Notwithstanding this fact, they were seized and detained until March 22d when the prize court ordered the government to pay \$600,000 for the cargoes. Other cargoes consigned "to order" in Holland, Sweden, Norway, and Italy, have likewise been seized.

²⁰ See the remarks of Senator Walsh on this point in the Senate, December 31, 1915, *Congressional Record*, p. 779.

"to order" of conditional contraband destined to neutral ports have not heretofore been regarded, apart from other incriminating circumstances, as creating a presumption of hostile destination. It is true that in the case of the *Nassau* during the Civil War the fact that the cargo was consigned "to order" was cited in connection with other circumstances to establish hostile destination, but it was not contended that this fact alone created a presumption of guilt which the owner was bound to rebut. In view of the embargo which the Netherlands, Denmark, Norway, Sweden, and Italy, under British pressure, have placed upon the re-exportation of contraband articles, the British rule in respect to shipments "to order" is, to say the least, an extreme assertion of belligerent rights over commerce between neutral countries.

The rule embodied in Articles 34 and 35 of the Declaration of London in regard to the carriage of conditional contraband is that the presumption of hostile destination exists only when the cargo is consigned to enemy authorities, to an enemy fortified place, or other place serving as a base for the armed forces of the enemy or to a contractor (*commercant*) who as a matter of common knowledge supplies articles of this kind to the government of the enemy. If not consigned to such persons or places, it is presumed to have an innocent destination and the onus of proving the contrary rests not upon the owner but upon the captor.²¹ In general this rule embodies a long-recognized practice and as such it is binding upon belligerents whether they have ratified the Declaration of London or not. The rule as to the burden of proof has heretofore been vigorously maintained by Great Britain, notably during the Russo-Japanese War.²² But as has been said, this rule was reversed by the British order in council of October 29th. Furthermore, the same order announced that whenever it was shown to the satisfaction of one of His Majesty's principal secretaries of state that the enemy government was drawing supplies for its armed forces from or through a neutral country, he might direct that in respect to ships bound for a port in that country Article 35 of the Declaration of London, which declares

²¹ See the observations of Mr. Bentwich on this point, in his Declaration of London, p. 71.

²² Compare, for example, Sir Edward Grey's contention in the case of the *Oldhamia* (1910), referred to by Dr. Edwin M. Borchard in this JOURNAL for January last, p. 140.

that conditional contraband is not liable to capture except when found on board a vessel bound for enemy territory or for the armed forces of the enemy, should not apply and so long as such direction was in force a vessel carrying conditional contraband to a port in that country should not be immune from capture. The effect of this order was to extend the rule of continuous voyage to the carriage of conditional contraband, and thereby to obliterate the distinction between the two classes of contraband, so far as their liability to capture is concerned. This distinction had already been largely abolished by putting on the list of absolute contraband many articles which are not such by their nature. What remained in the category of conditional contraband according to the British classification was now virtually assimilated to the status of absolute contraband by subjecting it to the same liability to capture and to the same presumptions as to hostile destination, to which absolute contraband is subject.

The controversies that have so far been raised during the present war in regard to the carriage of conditional contraband may be grouped into two classes: (1) those involving seizures of cargoes destined to belligerent ports; and (2) those involving the seizure of cargoes destined to neutral ports. The only important case of the first group was that of the *Wilhelmina*. This was an American steamer laden with grain and other foodstuffs consigned to an American citizen at Hamburg. While touching at the British port of Falmouth it was seized and placed in the custody of a prize court. Under ordinary circumstances the immunity of the cargo from capture would not have been questioned, since it was not consigned to the public authorities of the enemy, or to a government contractor or destined to a fortified place. But subsequent to its departure from America, the German *Bundesrath* issued a decree (January 25th) placing the grain and flour supply of the Empire under government control. In its original form, the decree provided that grain and flour imported from abroad should be deliverable only to certain organizations under the control of the public authorities; but shortly afterwards this provision was revoked, doubtless in consequence of the avowed intention of the British Government to regard all cargoes destined to Germany, under such circumstances, as consigned to enemy authorities, and therefore liable to capture, either under the terms of

the Declaration of London, or under the modifications of it made by the order in council of October 29th, which decreed that conditional contraband consigned to "merchants or other persons under control of the authorities of the enemy" should be liable to seizure. The declared purpose of the decree was merely to conserve the grain and flour supply, to protect the civil population against speculators and engrossers, and to insure its equitable distribution for private consumption, rather than to provide subsistence for the armed forces. The owners of the cargo of the *Wilhelmina* asserted that it was intended solely for the civil population, and the German Government gave assurance of its willingness to undertake to guarantee that no part of it should reach the government or any of its agents, or contractors, or the military or naval forces, and it offered to permit the distribution to be made under the supervision of American representatives. The German Government further insisted that the municipalities, the authorities of which were charged with carrying out the decree, were not a part of the Imperial Government but were "self-administrative" bodies elected by the local inhabitants, so that it could not be said that the control of the food supply was in fact in the hands of the "government." The British Government, however, took the position that consignments of foodstuffs to private individuals in Germany, under the régime of public supervision established therein, would when received be subject to the control of the government, and its distribution determined by the public authorities, notwithstanding the fact that the amended regulations applied only to the domestic food supply, and not to imported foods. Sir Edward Grey in his note of February 17th to the American Government affirmed that, in view of the "tremendous organization for war that now obtains in Germany there is no clear distinction between those whom the government is responsible for feeding and those whom it is not," and that "the reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces of the enemy government disappears when the distinction between the civil population and the armed forces itself disappears." He further asserted that "the power to requisition will be used to the fullest extent to assure that the wants of the military are supplied, and however much goods may be imported for civil use, it is by the military that they will be consumed if

military exigencies require it, all the more so now that the German Government has taken over the control of all foodstuffs in the country."

Finally, he added that the German decree was not the only ground on which the *Wilhelmina* was seized. The German Government had treated every town or port on the east coast of England as a fortified place or base of operations, and on the strength of this contention had subjected a number of them, some of which were in fact open and undefended towns, to bombardment, and on the same ground had seized cargoes of conditional contraband destined to such places and had condemned or sunk them. If such acts were justifiable on the ground that the places in question were fortified or constituted bases of operations, the British Government was still more justified in treating Hamburg (a port protected by fortifications) as a fortified place, and in capturing foodstuffs consigned thereto, as the Declaration of London allows.

Thus the British contention in the case of the *Wilhelmina* rests on two grounds: (1) the cargo was, in effect, consigned to enemy authorities, and (2) it was destined to a fortified place. But the German decree as amended does not, as has been said, apply to imported foodstuffs, and therefore unless it can be shown that the control which the German Government has established over the domestic supply (and it must be remembered that the decree applies only to grain and flour, which constitutes only a small portion of the *Wilhelmina's* cargo) may be indirectly extended to cover *imported* grain and flour, it cannot in strictness be said that the cargo was destined to the enemy public authorities or military forces. The British contention that Hamburg is a fortified place, of course, rests not so much upon fact as upon the principle of retorsion, namely, the right of the British Government to treat an open town as a fortified place because Germany has applied to unfortified English towns treatment which may lawfully be applied only to fortified places.

The question raised by the German decree and the construction which the British Government has put on it is a new one, and it is difficult to pronounce a positive opinion on its merits. If the decree applied to imported foodstuffs the contention of the British Government would probably be unassailable, but to hold that a municipal regulation designed to conserve and insure an equitable distribution of the domestic

food supply is a sufficient ground for treating as contraband, cargoes of imported food consigned to private purchasers is, to say the least, an unprecedented assertion of belligerent rights. The effect was virtually to put an end to neutral trade with Germany, since few articles of importance were left on the British list of non-contraband.

Let us turn now to the second group of cases involving carriage of conditional contraband, namely, those involving seizures of cargoes destined to neutral ports. Most of the controversies in respect to contraband that have so far arisen belong to this class. As has been said, the British Government by the order in council of October 29th extended the rule of continuous voyage to apply not only to the carriage of absolute contraband, but also to the carriage of conditional contraband.

The rule of continuous voyage was first applied to the carriage of contraband by the French courts during the Crimean War in the case of the *Frau Anna Houwina*, when a cargo of saltpeter bound from Lisbon to Hamburg, both neutral ports, was condemned on the ground that the real destination was a belligerent port in Russia. As is well known, it was applied by the American courts during the Civil War both to blockade running and the carriage of contraband, notably in the cases of the *Springbok*, the *Bermuda*, the *Stephen Hart*, and the *Peterhof*. It was applied by Great Britain for the first time during the Boer War. Until then the doctrine of continuous voyage as applied to the carriage of contraband had been vigorously denied in England by British prize courts and by the text writers. In the case of the *Immina* during the war between England and Holland at the beginning of the last century, Lord Stowell released a vessel proceeding from Dantzic to Emden, both neutral ports, notwithstanding the fact that Emden was situated within a distance of five miles from the enemy frontier. Baty remarks that Emden was the Nassau of Napoleonic times, and that if ever the doctrine of continuous voyage was justified it was in this case; but it was repudiated by Lord Stowell.²³

In 1885 when the French Government announced its intention of seizing neutral vessels carrying contraband goods to the English port of Hong Kong, on the ground that their ultimate destination was the

²³ International Law in South Africa, p. 10.

armed forces of China, the English Government protested vigorously and asserted the right of neutral vessels to trade freely between neutral ports.²⁴ During the Boer War, however, Great Britain undertook to apply the rule which she had formerly condemned. Three German ships, the *Bundesrath*, the *Herzog* and the *General*, bound for the neutral port of Lorenzo Marquez in Delagoa Bay, were seized on the ground that portions of their cargoes consisted of contraband the ultimate destination of which was the Boer armies. The ships were released on account of the vigorous protest of the German Government. Several vessels laden with cargoes of American flour bound to Portuguese ports in Delagoa bay were also seized by British cruisers during the same war. There was a strong protest in the United States, and the American Government declared that it could not recognize the validity of "any right of capture by a belligerent of provisions and other goods transferred by American citizens in the ordinary course of commerce and destined to a neutral port." But it turned out that the ships were English and not neutral vessels, and were seized for transporting goods to enemy territory in violation of a municipal statute. The seizure of the cargoes was declared to be incidental to the seizure of the ships, and the British Government agreed to liberate or purchase them. The controversy was not, therefore, one involving the question of contraband.²⁵ It was at this time that Lord Salisbury expressed the now oft-quoted statement that "foodstuffs with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure." Since the German vessels had on board or were suspected of having on board absolute contraband, the right to search them would not now be denied, and if the evidence had shown an ultimate hostile destination, the contraband goods could have been condemned, for it is now generally admitted that an inland enemy cannot be allowed to draw its military

²⁴ See an article by Geffcken entitled "La France en China et le Droit International," in the *Rev. de Droit International et de Lég. Comp.*, Vol. 17, p. 149 (1885).

²⁵ J. B. Moore, "*La Contrabande de Guerre*," *Revue de Droit International et de Lég. Comp.*, Vol. 44, p. 239. The whole subject of these seizures is examined at length in Campbell's *Neutral Rights and Obligations in the Anglo-Boer War*, Chap. III. See also the *Congressional Record*, January 17, 1900, p. 900.

supplies through a neutral port when it is the regular port of entry for the enemy. Count Hatzfeld's ²⁶ assertion that whatever may have been on board the *Bundesrath*, there could have been no contraband of war, since "according to recognized principles of international law, there cannot be contraband of war in trade between neutral ports," undoubtedly represented the Continental view as well as that upon which the British Government had always acted in the past. It was to meet such a situation as that presented by the Delagoa Bay cases that the Declaration of London allows the rule of continuous voyage to be applied to the carriage of conditional contraband as well as absolute contraband when an enemy country has no seaboard.

The general rule of the Declaration, however, is that the doctrine of continuous voyage applies only to the carriage of absolute contraband, and the only exception it makes is where the enemy has no seaboard. In the present war, both Germany and Austria have seaports, and hence the rule of continuous voyage cannot, according to the Declaration, be applied to the carriage of American cargoes of conditional contraband to neutral ports in Europe.²⁷ But this feature of the Declaration was not acceptable to Great Britain, and it was modified by the order in council of October 29th, and she is now applying the rule which the British prize courts have always repudiated. Lord Stowell, in the case of the *Immina*, to which reference has been made, laid down the rule that "goods going to a neutral port cannot come under the description of contraband * * * the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port."

²⁶ Letter to Lord Salisbury, January 14, 1900.

²⁷ Mr. Norman Bentwich in an article in this JOURNAL for January last (p. 36), referring to the exception made by the Declaration of London in the case of belligerents which have no seaboard, asserts that there are "peculiar conditions in the present war, due to the fact that neutral ports, such as Rotterdam and Copenhagen, became the chief means of access to a large part of Germany, owing to the mining of the North Sea and the naval operations. Germany, in fact, was assimilated to the position of a country having no sea coast, because there were no ports on her coast line to which neutral shipping could put in. And the allies naturally could not be expected to allow his armies to be supplied through neighboring neutral ports with food stuffs or fuel or military clothing or railway material any more than with arms and ammunition." Such an interpretation goes to show that the Declaration means what belligerents following their own interests choose to construe it to mean, and nothing more.

When the contrary rule was applied by the United States during the Civil War, the British Government, it is true, did not make a formal protest, nor did it intervene in behalf of British owners, but it is well known that the attitude of the government was one of acquiescence rather than of approval. The rule recognized by the British Government at the time was embodied in the "Manual of Naval Prize law," one passage of which reads, "A vessel's destination should be considered neutral if both the port to which she is bound and every intermediate port at which she is to call in the course of the voyage is neutral," and "the destination of the vessel is conclusive as to the destination of the goods on board."²⁸ The doctrine of continuous voyage as applied to the carriage of contraband, whether it be absolute or conditional, has been unanimously condemned by British and Continental publicists. Hall remarks that it has been unanimously reprobated outside the United States, and would probably now find no defenders in that country.²⁹ "Goods on board a neutral ship, destined to a neutral port, and consigned to neutral purchasers therein or to agents who sell them there," says Westlake, "cannot be said to be destined for the use of a belligerent." In such a case, he goes on to say, they can have only a neutral destination. What subsequent disposition is made of them will depend on the consignee-purchaser or agent, and this cannot be known to the shipper. He may have an expectation that they may ultimately find their way to a belligerent, but expectation is not intention. If after becoming a part of the common stock of the country in which they are delivered, they are subsequently sold and reforwarded to a belligerent, it will be in consequence of a new destination given them. "Therefore," concludes Westlake, "it is not contended by any one that on the way to the neutral port there will be a right to capture, whatever be the character of the goods."³⁰

²⁸ When the attention of Lord Salisbury was called to these passages by Count Hatzfeldt at the time of the controversy over the seizure of the *Bundesrath*, he replied that the manual "could not be admitted to contain an authoritative statement of the views of the Lords Commissioners" and that the rules of the manual were "quite inapplicable to the case of a war with an inland state whose communication with the sea is over a few miles of railway to a neutral port."

²⁹ International Law, p. 673.

³⁰ *Ibid.*, Vol. II, p. 253.

It is otherwise, of course, if the goods shipped to a neutral port are under orders to be reshipped to a belligerent army or government, in case they are conditional contraband, or to belligerent territory if they are absolute contraband; for in that case there is no new commercial transaction, and no new voyage, and hence the rule of continuous voyage applies to such shipments. Atherley-Jones, another well-known English authority on international law governing commercial relations between belligerents and neutrals, takes the same position as Westlake. Referring to the action of Italy in 1896 in seizing neutral cargoes for the Red Sea littoral³¹ on the ground that they were intended for the use of the military forces of Abyssinia, with which country Italy was then at war, and to the like action of Great Britain during the Boer War, he says: "It is time to say plainly that neutrals are not likely ever to permit their own trade to be threatened by such extended theories of belligerent rights or to allow their ports to be virtually closed to traffic because they happen to be convenient ports for the enemy." Again, he asserts that "despite every temptation to stretch the rights of Great Britain to the fullest pitch, not a single case can be found of a ship's being stopped, much less condemned, when in transit to a neutral port, however suspiciously convenient for the enemy. It is impossible to regard without the greatest apprehension the concession of a license to belligerents to condemn goods all over the world on suspicion satisfactory to themselves that their enemies are ultimately intended to have the benefit of them."³²

Baty³³ and Bentwich adopt substantially the same view. Bentwich

³¹ See the case of the *Doelwick*, a Dutch ship captured by an Italian cruiser in 1896 while bound for the French-African port of Djibouta. A part of the cargo consisted of arms and munitions of war which, it was alleged, were to be transported across French territory to Abyssinia. Curiously enough, the Italian prize court held the capture to be legal, but released the ship because at the time of the trial the war had closed. The decision is strongly criticised as "a new and specious doctrine" by the Italian jurist, Brusa, in the *Revue Générale de Droit International Public*, Vol. 4, pp. 159-175. He holds that the cargo should have been condemned. See also an article in the same *Revue*, pp. 39 *et seq.* by M. Despagne and another by M. Fauchille, (*ibid.*, pp. 297-323) who attacks vigorously the whole doctrine of continuous voyage as applied to the carriage of contraband.

³² Commerce in War, p. 257.

³³ International Law in South Africa, pp. 6, 19.

remarks that the doctrine of continuous voyage has no application to trade in conditional contraband and that such goods are liable to capture (with a negligible exception) only when found on a vessel bound for the enemy's territory, and then only when they are destined for the armed forces. To allow capture upon suspicion that an eventual belligerent destination was intended would, he says, be an "excessive interference with neutral trade, which would inevitably cause friction, because, by its very nature, conditional contraband, being useful for the ordinary civil population, its seizure when destined to neutral ports would be unreasonable."³⁴ That this was still the view held by the British Government at the time of the Naval Conference appears from the memorandum submitted by the British delegation. In this memorandum it was stated that "the doctrine [of continuous voyage] is applicable only when the entire voyage is effectuated in the execution of a single commercial operation, preconceived from the beginning. Thus it should not be applied when the proof is limited to the establishment of the fact that the goods have been sent to a neutral port in the hope of finding a market there for the shipper." Furthermore, it adds, "there exists no case decided by the British courts and which has been reported, in which the doctrine of continuous voyage has been applied in express terms to the transportation of contraband."³⁵

The Declaration of London embodies in part this view. It applies the rule of continuous voyage to the transportation of absolute contraband, but forbids it in the case of conditional contraband, except in the rare case where the belligerent has no seaboard. The distinction is a reasonable one, and it is proper that there should be a different rule governing the liability of the two classes of articles to capture and as to the presumption of hostile destination. Articles used exclusively for war purposes, when shipped in abnormal quantities to neutral ports, where there is little or no local demand for them, may well be presumed to be intended for the military use of an adjacent belligerent; but the

³⁴ The Declaration of London, pp. 18, 75. Since the outbreak of the present war, Mr. Bentwich has apparently changed his views on this point. See his article in this JOURNAL for January last, p. 37.

³⁵ This is a literal translation from the French text. Proceedings of the International Naval Conference, House of Commons Sessional Papers, Misc., No. 5 (1909), p. 95.

presumption is much less strong in the case of goods which are used equally for civil as well as military purposes. The British Government, however, has found a convenient means of evading the rule of the Declaration by putting on its list of absolute contraband many articles which are in fact conditional contraband, after which the rule of continuous voyage is applicable. Thus the rule is applied, not by direct extension, but indirectly by the transfer of articles from one to the other class of contraband. If the cargo consists of absolute contraband, it is liable to capture if destined to belligerent *territory*, and it is immaterial whether the carriage is indirect or entails transshipment either by land or sea. On the other hand, if it consists of conditional contraband, it is liable to capture only when it is destined for the use of the armed forces or to a fortified place, the public authorities, or government contractors. Moreover, it is not liable to capture unless found on board a vessel bound for enemy territory, and the ship's papers are conclusive evidence as to the destination, unless it is clearly out of the course indicated by the papers. The liability to capture and the presumption of guilt are therefore very much greater in the one case than in the other. The extension by the British Government of the rule of continuous voyage to the carriage of many articles which are in fact conditional contraband is an unprecedented, if not an unwarranted assertion of belligerent rights, and it is none the less so because it has been done indirectly through a scheme of classification which is itself contrary to international usage in the past.

The British Government has gone further and employed its power over neutral commerce to compel such neutral countries as Italy, the Netherlands, Norway, Sweden, and Denmark, to place an embargo upon the exportation to enemy territory of many articles of both absolute and conditional contraband. Confronted by the prospect of seeing their trade with America reduced to insignificant proportions, one after another of these States were induced to prohibit the exportation or transportation through their territories of such goods as the British Government chose to regard as contraband, and which therefore it would not permit to be delivered in their ports from abroad without a pledge that it should not be allowed to go on to Germany or Austria. The result is commerce between America and the neutral Powers of

Europe is virtually carried on under a license from the Government of Great Britain, as may be seen from the following statement issued by the British Ambassador at Washington, January 8th last:

Shipments for Italy, in Italian steamers, of goods placed on the embargo list of the Italian Government and consigned to named persons are free. Articles for Holland, apart from copper, petroleum, and grain (except rice and corn) which must be consigned to the Netherlands government, should be consigned to the Netherlands Overseas Trust in order to ensure non-interference.

International law of course imposes upon neutrals no obligation to forbid their nationals to sell or ship munitions of war to belligerents, much less articles of innocent use. Great Britain has not in the past regarded such trade as illegitimate, and it is well known that during the Boer War she obtained from Germany the quick-firing guns which she so much needed, and from Austria the big Howitzers for the siege of Pretoria.³⁶ She is, of course, drawing unlimited supplies from America during the present war, and would no doubt regard an embargo on the exportation of those supplies as an act of unfriendliness toward her. Yet by means of pressure she has compelled various neutral governments of Europe to prohibit a trade which has heretofore been regarded as legitimate and from which she herself has profited in the wars to which she has been a party in the past.

The American Government has been reproached by the British Government for protesting against the exercise by Great Britain of a right which the United States exercised in respect to the carriage of contraband during the Civil War. Thus, in a communication to the Department of State in November last, the British Ambassador said:

As you are aware, the Supreme Court of the United States in 1863 considered vessels as carrying contraband, although sailing from one neutral port to another, if the goods concerned were destined to be transported by land or sea from the neutral port of landing into the enemy's territory. It then decided that the character of the goods is

³⁶ Spaight, *War Rights on Land*, p. 478. Article 7 of the Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land declares that "a neutral power is not bound to prevent the export or transport on behalf of one or the other belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet."

determined by their ultimate and not their immediate destination, and this doctrine was at the time acquiesced in by Great Britain, though her own trade was the chief sufferer.

But the fact is, the circumstances under which the rule of continuous voyage was then applied differ materially from those under which it is now being applied by Great Britain. In most of the American cases, the seizures were for intent to enter blockaded ports of the enemy, and in those cases where the offense was the carrying of contraband unconnected with blockade running (*e. g.*, the case of the *Peterhof*), the cargoes consisted for the most part of absolute contraband (arms, ammunition, and military equipment) to which the rule of continuous voyage is now generally recognized as applicable; whereas, during the present war the cargoes that have been seized while en route to neutral ports in Europe in no case contained articles that are exclusively used for military purposes (the British classification to the contrary notwithstanding) and to which therefore the rule of continuous voyage can be legitimately applied. Again, in the Civil War cases, the evidence clearly showed the existence of hostile destination and use. In all these cases the court laid down the rule that the intent of the owner or shipper was an important if not the decisive element in determining the liability to capture.³⁷

In no one of the present cases have the circumstances indicated hostile intent. In every case the voyage was *bona fide*, the cargo being consigned either to a specific person or "to order" in a neutral port where there was a large local demand, and while there may have been an expectation on the part of the owner that the goods would probably find their way ultimately to a belligerent country, it is impossible to say that either the owner of the vessel or the cargo *intended* that it should be reshipped or reforwarded by land.

Again, in the Civil War cases the neutral ports to which the captured vessels were ostensibly destined were really nothing but ports of call or transshipment where there existed little or no local demand for the objectionable goods. After delivery, if they were unladen, they did not become a part of the common stock, but were immediately *reladen*

³⁷ See notably the cases of the *Circassian* (1864), 2 Wall. 135; the *Springbok* (1866), 5 Wall. 1; the *Dolphin* (1863), 7 Fed. Cases, 868; the *Bermuda* (1865), 3 Wall. 514.

on another vessel and reforwarded to belligerent territory. As Judge Marvin said in the case of the *Dolphin*, Nassau furnished no market for such a cargo as the vessel contained. "It is," he said, "a small town. The adjacent islands possess but a small population dependent upon it for supplies. Probably not three merchant steamers ever arrived at that port from any part of the world until after the present blockade was established, except the regular government mail steamers." The size of the country, the smallness of the population, and the absence of local demand, therefore, repelled the assumption that goods of the character and quantity involved in these transactions were intended for local consumption. In the present war the neutral ports to which the detained cargoes were consigned are the ports not of small islands but of countries with extensive populations among whom there is a large local demand for the particular commodities in question,—a demand which was increased considerably by the cutting off of the accustomed supply at the outbreak of the war, from the neighboring belligerent states. They are not mere ports of call or transshipment. In every case the cargoes were intended to be unloaded, after which they would become mixed with the common stock of the country,—a transaction which interrupts the voyage, and if a subsequent shipment took place, it would be an entirely new voyage and not a continuation of the initial voyage.

Sir Edward Grey, in his first note to the American Government, produced statistics to show that there had been a large increase in the volume of exports, particularly of copper, from America to the neutral countries of Europe since the outbreak of the war. "With such figures," he said, "the presumption is very strong that the bulk of copper consigned to those countries has recently been intended not for their own use but that of the belligerent, who cannot import it directly." But there has always been a large demand for copper in these countries and, as has been said, it was increased by the cutting off of the supply from Germany and Austria at the outbreak of the war. Moreover, copper is used extensively in the industrial arts and is not, therefore, absolute contraband in fact, and the rule of continuous voyage to the transportation of it from one neutral country to another is not applicable, since Germany and Austria both have sea ports. The assertion of the right

to capture cargoes of such goods while on their way to a neutral port is based on a confusion of the possibility of reshipment to belligerent territory with hostile intent on the part of the shipper. There may have been a probability that they would ultimately find their way to enemy territory, but is it reasonable to assume that it was the intent of the shippers to reforward them? Such an assumption, as M. Fauchille remarks, violates one of the basic principles of international law: it creates a presumption of hostile intent where no such intent may exist, and it undertakes to punish not the real offense—the ultimate expedition to the belligerent—but the shipment from one neutral port to another, which may be a perfectly innocent transaction.³⁸

The validity of voyages under such circumstances was clearly admitted by the Supreme Court of the United States during the Civil War. "Neutrals may," said Chief Justice Chase, in the case of the *Bermuda*,³⁹ "convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination and to become part of the common stock of the country or of the port." Again the court said in the case of the *Springbok*,⁴⁰ "if the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common stock

³⁸ See his vigorous attack on the whole doctrine of continuous voyage as applied to the carriage of contraband, in an article entitled "*La Théorie du Voyage Continu en matière de contrebande de Guerre*" in the *Revue Générale de Droit International Public*, Vol. 4, pp. 279-232 (1897). M. Fauchille declares that the doctrine of continuous voyage is itself a veritable juridical anomaly. To inflict on a voyage between two neutral ports, he says, the penal consequences of a voyage between a neutral port and an enemy port, under the pretext that the cargo will be re-exported to an enemy port is, in fact, to assimilate successive voyages to a single voyage. The theory rests on a fiction of law. But fictions are by their essence contrary to international law. Compare also Twiss, "The Theory of Continuous Voyage Applied to Contraband of War and to Blockade." See especially p. 27, where he calls attention to the consequences to which shipments of saltpeter from Calcutta to London would be exposed, for example, during a war between Russia and Turkey, if the doctrine of continuous voyage should be applied. The view expressed by Fauchille and Twiss is that held by practically all English and Continental jurists. Compare, for example, Geffcken, in Holtzendorff's *Handbuch des Völkerrechts*, Vol. IV, Sec. 161; Heffter, *Droit International de l'Europe*, p. 392, and Gessner, *Le Droit des Neutres sur Mer*, 2d ed., p. 137.

³⁹ 5 Wall. 514.

⁴⁰ *Ibid.*, 1 (1865).

of the island, it must be restored notwithstanding this misconduct" (falsification of the bill of lading and concealment). But the doctrine of continuous voyage applied by the Supreme Court of the United States under circumstances wholly different from those under which it has been applied by Great Britain during the present war, and, therefore, with much more justification, was almost universally condemned outside the United States as an unwarranted violation of neutral rights.⁴¹

It is probably safe to say that the majority of the controversies between belligerents and neutrals to which every war gives rise are connected with trade in contraband. It has therefore been proposed by some writers that neutral governments should forbid their nationals to engage in such traffic, and some even maintain that they are under an obligation to do so.⁴² In practice, the governments of certain states have occasionally undertaken to prevent the sale to belligerents of contraband goods. Thus, during the Franco-German War of 1870, the Governments of Austria, Denmark, Spain, the Netherlands, Belgium, Switzerland, and Japan prohibited the exportation of arms and munitions of war to either belligerent, those of Belgium, Switzerland, and Japan considering that it was their duty to do so.⁴³ During the same war the German Government declared through its representatives at London and Washington that neutral governments were not permitted

⁴¹ See the strong protest prepared and signed by a committee of English and Continental jurists, published in the *Revue Générale de Droit International Public*, Vol. 14, pp. 329-331. See also Moore's Digest, Vol. 7, pp. 727-739 for this and numerous other protests and criticisms.

⁴² Among them may be mentioned Kleen (*Contrabande de Guerre*, p. 52), Hautefeuille (*Nations Neutres en Temps de Guerre*), and Field (Outlines, Sec. 964). Woolsey (International Law, p. 320) thinks all innocent trade with the enemy should be free, but that neutrals should pass stringent and effectual laws against contraband trade. Phillimore (International Law, Vol. III, Secs. 227-241) seems to hold the same opinion.

The question was discussed by the Institute of International Law at its sessions of 1892, 1894, and 1896 (see the *Revue Générale de Droit International Public*, Vol. III, pp. 648-658 for a review of the discussions). The proposal to prohibit trade in contraband was opposed by Lardy, Stoerk and General Den Beer Poortugael, but defended by Brusa. At the session of 1896, the Institute agreed to a proposal to abolish conditional contraband, reserving to belligerents a right of sequestration or preëmption at their pleasure and to neutrals an equitable indemnity. (*Annuaire*, T. XV, pp. 205 *et seq.*)

⁴³ Kleen, *op. cit.*, p. 52. See also Fauchille, p. 322, and Rivier, Vol. II, pp. 412-413.

to allow their nationals to engage in such trade, but, on the contrary, it was their duty to prohibit it, because "the precepts of international law are binding upon states as well as upon individuals."⁴⁴ During the Spanish-American War, the Governments of Brazil and Denmark likewise prohibited the exportation of war materials to either belligerent, and the government of Great Britain by a proclamation of April 23, 1898, warned British subjects against committing any acts "contrary to their duty as subjects of a neutral Power" or contravening the presumptions of international law. Among the acts enumerated in the proclamation were the transportation of arms, munitions of war or military goods or materials.⁴⁵ These cases of prohibition are, however, exceptional. The general rule is that neutral governments are not bound to forbid their nationals from engaging in such trade, although they have an unquestioned right to do so, provided it is done at the outbreak of the war and not after one of the belligerents may have gained control of the seas, in which case an embargo might be construed as an unfriendly act toward the belligerent which, by its naval supremacy, has cut off the supply of the other. Thus the proposed American embargo now advocated by certain German-Americans would no doubt be so construed by Great Britain, and not without reason.

A practical objection to the proposal to create an obligation on the part of neutrals to prohibit the exportation of contraband goods is to be found in the heaviness of the responsibility which it would impose upon neutral governments. This was pointed out in the discussion of the proposal by the Institute of International Law in 1892, 1894 and 1896. As Spaight remarks, if a neutral Power were held responsible for all the commercial transactions of its subjects with belligerents, most of the nations of the world would have to rewrite their constitutions whenever a war began and establish a system of governmental espionage and interference which would be intolerable and impossible.⁴⁶

Another proposal which goes to the opposite extreme is to remove all

⁴⁴ Bluntschli, *Droit International Cod.*, Sec. 766, and Kleen, p. 51.

⁴⁵ Proclamations and Decrees During the War With Spain, p. 35. See also an article by Professor J. B. Moore entitled *La Contrabande de Guerre*, in the *Revue de Droit International et de Lég. Comp.*, 1912, pp. 226-227.

⁴⁶ War Rights on Land, p. 475.

restrictions on trade in contraband and to exempt contraband goods from liability to capture. Such a proposal was made by the British delegation at the Second Hague Conference. In its memorandum it called attention to the lack of precise rules governing the question of what is and what is not contraband and the multiplicity of controversies to which trade in contraband goods gives rise. It also pointed out that the right of capture in such cases is out of harmony with modern conditions. In the days of sail boats, it was said, contraband consisted almost exclusively of articles used only for war purposes, and the destination of the ship sufficed ordinarily to indicate the hostile destination and character of the goods. Moreover, ships were small in size, and the right of search could be exercised easily and without the necessity of diverting the ship to a distant port for the purpose of verifying the character of the cargo, and thus subjecting the shipper to ruinous losses on account of long detention. To-day these conditions no longer exist. The number and variety of contraband articles are vastly greater, and the increased size of ships makes search on the high seas much more difficult. Furthermore, with increased railroad facilities contraband easily finds its way to belligerents, so that prohibitions are usually ineffective. All these circumstances tend to render more difficult the exercise of the right of search, to multiply the number of controversies and to inflict upon neutral commerce an inconvenience out of all proportion to the legitimate interests of belligerents.⁴⁷

It is interesting to note that of thirty-five states voting on the British proposal, twenty-six voted for it.⁴⁸ Only five; Germany, the United States, France, Montenegro, and Russia, voted against it. This vote was very significant, and indicated a general dissatisfaction with the present rule and practice in regard to trade in contraband and the desire for a new and less objectionable solution of the problem.⁴⁹

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⁴⁷ See the memorandum in *Deuxième Conférence de la Paix, Actes et Documents*, Tome I, pp. 256-258.

⁴⁸ *Ibid.*, Tome III, p. 881.

⁴⁹ Professor J. B. Moore, in a recent address before the National Foreign Trade Convention at St. Louis, pointed out the unsatisfactory character of the rules of the Declaration of London in respect to trade in contraband. The inferences which it creates in regard to hostile destination, he says, are so vague that "they would seem

to justify in almost any case the presumption that the cargo, if bound to an enemy port, was 'destined for the use of the armed forces or of a government department of the enemy state.' Any merchant established in the enemy country, who deals in the things described, will sell them to the government; and, if it becomes public that he does so, it will be 'well known' that he supplies them. Again, practically every important port is a 'fortified place'; and yet the existence of fortifications would usually bear no relation whatever to the eventual use of provisions and various other articles mentioned. Nor can it be denied that, in this age of railways, almost any place may serve as a 'base' for supplying the armed forces of the enemy. And of what interest or advantage is it to a belligerent to prevent the enemy from obtaining supplies from a 'base,' from a 'fortified place,' or from a merchant 'well known' to deal with him in his own country, where, the entire community being subject to his authority, he can obtain by requisition whatever he needs, if dealers in commodities hesitate to sell voluntarily." The proper solution according to Professor Moore is to be found, if not in the abolition of the principle of contraband, at any rate in the adoption of a plan embracing (1) the abolition of conditional contraband and (2) a single list having been agreed upon, in the coöperation of neutrals and belligerents in the certification of the contents of cargoes so that the risk of capture may be borne by those who may voluntarily assume it. Harassing searches and detentions will then be heard of no more.